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No. 95-1425

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LUCIOUS ABRAMS, JR., REV. G. L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

BRIEF OPPOSING MOTIONS TO AFFIRM

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I. Two Reasonably Compact Majority Black Districts Can Be Drawn

A. The State's First Plan Was Not Unconstitutional

Appellees contend that the first congressional redistricting plan enacted by the state in 1991 containing two majority black districts was based "solely" on race, and that the Eleventh District in that plan was found to be unconstitutional by the district court. Motion to Affirm of Appellees Miller *et al.*, p. 12; Motion to Affirm of Appellees Johnson *et al.*, p. 14. Both contentions are flatly wrong.

In *Miller v. Johnson*, 115 S.Ct. 2475 (1995) (*Miller I*), the Miller appellees made exactly the *opposite* argument in this Court. In its brief on the merits, the state said that:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Miller v. Johnson, No. 94-631, Brief of Appellant Miller *et al.*, p. 49 (emphasis in original). The state repeatedly stressed "the undisputed consensus of all of the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable." *Id.* and at p. 18.

In addition, the Johnson appellees never contended in the district court that the first or second congressional redistricting plans were unconstitutional, and introduced

no evidence that they were. In response to a question from the district court, the plaintiffs' lawyer answered that "I don't think that we have a position on the first two plans because they never went to law." *Johnson v. Miller,* Civ. No. 194-008 (S.D.Ga.), Trial Transcript, July 22, 1994, Volume II, p. 23 ("T. Vol., July 22, 1994"). Nor was there any finding by the district court that the first plan enacted by the state was unconstitutional.

The record itself refutes any contention that the Eleventh District was initially drawn "solely" on the basis of race. The first plan excluded "a sizable black population in Baldwin County," T. Vol. II, July 22, 1994, p. 21 (Testimony of Linda Meggers), as well as "a sizable black population of Chatham [County]". *Id.* at 25. Had the construction of the Eleventh District been driven solely by race it would have included these areas.

The speaker of the house said that the Eleventh District as drawn in the first plan "suited me," was "obviously" acceptable, and denied that it was "a racial gerrymander." T. Vol. II, July 22, 1994, p. 81. The chair of the house reapportionment committee similarly testified that in enacting the first congressional plan, "[we] thought we had done pretty well." T. Vol. III, July 22, 1994, p. 252 (Testimony of Bob Hanner). The state complied with the Voting Rights Act, as well as followed its traditional redistricting principles, *i.e.*, "we kept cities and counties intact." *Id.*

B. The Existence Of Other Alternative Plans

While the state now argues *post hoc* that a second majority black district cannot be drawn consistent with the state's traditional redistricting principles, that was not the view of members of the general assembly after the decision in *Miller I.* The speaker of the house, "even after the court decision, said that he thought you ought to have two majority minority seats in Georgia." *Johnson v. Miller, supra,* Trial Transcript, October 30, 1995, p. 433 (Testimony of Linda Meggers) ("T., Oct. 30, 1995").

The house, in fact, after the decision in *Miller I,* adopted a plan that included two majority black districts, the Fifth located in the metropolitan Atlanta area and the Eleventh located in the east central part of the state. *Johnson v. Miller, supra,* Abrams Exhibit 37. The state's demographer testified that the Eleventh District under that plan contained fewer counties than many other Georgia congressional districts, and in terms of its size and length was "within the range of districts that the state has created in the past." T., Oct. 30, 1995, p. 444.

Other proposed remedial plans similarly contained two reasonably compact majority black districts, *e.g.*, the coalition 3RN Plan, T., Oct. 30, 1995, p. 445, the Illustrative Plan submitted by the Department of Justice, *United States v. Johnson,* No. 95-1460, J.S. App. 44a-45a, and several plans submitted by the Abrams appellants. T., Oct. 30, 1995, p. 297, Abrams Exhibit 35, 36.

In criticizing appellants' plans, the Johnson appellees go to absurd lengths. They say that two majority white counties included in one of the plans are "a 'whole

county' land bridge." Motion to Affirm of appellees Johnson *et al.*, p. 6. Of course, whole counties cannot be "land bridges," *i.e.*, narrow unpopulated corridors. *Miller v. Johnson, supra*, 115 S.Ct. at 2484. In addition, appellants "least change" plan split no rural counties. T., Oct. 30, 1995, 301; Abrams Exhibit 36. It therefore did not subordinate the state's traditional redistricting principles to race.

According to appellants' expert, one of the overriding goals of the "least change" plan was "to show that it is possible to draw districts in the State of Georgia for members of Congress that did not use race as a predominant feature and on the other hand were fair to black as well as white voters." T., Oct. 30, 1995, 301. It clearly was possible to draw a second reasonably compact majority black district based on the state's traditional redistricting principles, but the district court, substituting its own redistricting principles for those of the legislature, refused to do so.[1]

[1] The Johnson appellees make the extraordinary and erroneous claim that the record is "devoid" of any analysis of voting patterns justifying any need for majority black districts in Georgia. Motion to Dismiss of Appellees Johnson *et al.*, p. 23. To the contrary, there was extensive evidence of racial bloc voting introduced during the trial of the case, and in its remedial order the court found that "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid [minority vote] dilution." J.S. App. 26.

II. The Issue Presented Is Whether A Court May Ignore State Policy

The issue presented in this appeal is not, as the state appellees contend, whether a court may make "significant changes" in a redistricting plan found to violate the Fourteenth Amendment. Motion to Affirm for appellees Miller *et al.*, p. 6. By definition, some change is required. Rather, the issue is whether a court may accord no deference whatever to a state's legislative plan, including those portions not found to be unconstitutional, ignore the state's redistricting policy choices, and proceed as if the state had adopted "no plans." J.S. App. 7.

The district court was of the view that "Georgia's current congressional plan cannot form the basis for the remedy we now construct." J.S. App. 4. *See also* J.S. App. 5 ("we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals"). Moreover, what the district court did is as revealing as what it said. It totally relocated the Eleventh District and put it in "the Northeast Atlanta corridor." J.S. App. 14. It also drastically reconfigured the Third, Tenth, and Eight Districts. The state's argument that the district court "[ ]regarded the legislature's earlier actions in 1991 and 1992" are not supported by the facts in this case. Motion to Affirm for Appellees Miller *et al.*, p. 11 n.2.

The court committed legal error in taking a "blank check" approach to remedying the constitutional violations in this case. *Missouri v. Jenkins*, 115 S.Ct. 2038, 2058 (1955) (O'Connor, J., concurring). *See also Upham v. Seamon*, 456 U.S. 37, 42 (1982) (a court may not reject state

policy more than is necessary "to meet the specific constitutional violations involved").

III. There Was No Section 2 Hearing On The Court's Plan

Appellees mistakenly claim that appellants were given a hearing on their Section 2 dilution claim. The district court did conduct a hearing at which it allowed the parties an opportunity to present proposed remedial plans, but it did not hold a hearing to allow the parties an opportunity to comment and present evidence concerning the plan that the court actually adopted. In light of *SRAC v. Theodore*, 113 S.Ct. 2954 (1993), the court erred.

IV. The Court's Plan Was Retrogressive

Appellees say that appellants' position is that "a new plan could never have less than ten percent majority black districts." Motion to Affirm of appellees Miller *et al.*, p. 14-5. Correctly stated, appellants' position is that given the state's existing demographics, a plan that contains only one majority black district is retrogressive within the meaning of Section 5, and that is true whether the benchmark is the 1982 plan, the 1991 plan, or some other plan embodying the state's redistricting goal of creating two majority black districts. If the state's black population were to decline, or disappear altogether, appellants would not argue that the benchmark for retrogression would remain unchanged.

The Miller appellees' argument that *City of Richmond v. United States*, 422 U.S. 358 (1975), contains a "good

government" exception to Section 5 is misplaced. *City of Richmond* held that municipal annexations were not objectionable under Section 5 where the resulting districting "system fairly reflects the strength of the Negro community as it exists after the annexation" 422 U.S. at 371. The court ordered plan in this case does *not* fairly reflect the strength of black voters as it currently exists, and under the rationale of *City of Richmond* is retrogressive.[2]

The objected to 1991 plan was not legally enforceable as a matter of federal law because it was objected to under Section 5. However, it did embody the state's redistricting policy of creating two majority black districts which was not objected to by the Attorney General and which can provide a benchmark for determining retrogression. *Upham v. Seamon, supra*, 456 U.S. at 42.

In the related case of *Johnson v. Miller*, Civ. No. CV196-040 (S.D.Ga.), the state has argued that plans for the house and senate objected to under Section 5 should nonetheless be implemented by the three judge court on an interim basis for the 1996 elections because "the 1995 plans reflect a host of political and policy choices throughout the state. It is those lines . . . that merit deference." Brief of Defendants Miller, Howard and Massey for the Preliminary Injunction, p. 11. While appellants do not believe an objected to plan can be implemented by

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[2] The Johnson appellees erroneously suggest that Section 5 standards are not applicable to court ordered plans. Motion to Affirm for Appellees Johnson *et al.*, p. 11. While court ordered plans are not subject to preclearance, they nevertheless must comply with Section 5 standards. McDaniel v. Sanchez, 452 U.S. 130, 148-49 (1981).

a court, *Clark v. Roemer*, 500 U.S. 646, 654 (1991), the state's 1991 plan, as the state argued in the house and senate case, can serve as a benchmark for determining retrogression since it embodies the state's "political and policy choices" of having two majority black districts which were not objected to by the Attorney General.

V. Appellants Have Not Taken Inconsistent Positions On Deviation

The Johnson appellees wrongly claim that "[e]very alternative plan" advanced by appellants had a deviation that greatly exceeded .35%, and that they took an inconsistent position in the district court on the issue of permissible deviation from ideal district size. First, one of the plans advanced by appellants has a deviation of only .29%, which is lower than the deviation contained in the court ordered plan. *Johnson v. Miller, supra*, Supplemental Declaration of Selwyn Carter, Plan A.

Second, counsel for appellants stressed that the court "has really got to be concerned about deviations in any plan. . . . There is no *de minimis* deviation and a jurisdiction is obligated to make a good faith effort to comply with population equality concepts." T., Oct. 30, 1994, 281-82. Counsel specifically said that "if the Court is going to have a higher deviation . . . you must be careful to articulate the reason for doing so," that the deviation in one of appellants' plans was .93%, "that you could split some counties . . . and cure those deviations," and that *appellant's plan* preserving counties intact and creating two minority districts "might" be acceptable under *Karcher v. Daggett*, 462 U.S. 725 (1983). *Id.* at 283-84. The

district court, however, in adopting a plan that included only one majority black district, failed to articulate a sufficient reason for not complying with the standard of population equality set out in *Karcher*.

CONCLUSION

For the above reasons, this Court should summarily reverse or in the alternative note probable jurisdiction of this appeal.

Respectfully submitted,

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